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82-815

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

In Re: WILLIAM LEE KOVACS,
Debtor

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a, B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,
Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDICES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

No. 81-3320

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN RE: WILLIAM LEE KOVACS,
DEBTOR

STATE OF OHIO,
Plaintiff-Appellant,

v.

WILLIAM LEE KOVACS d/b/a B & W ENTERPRISES; HAMILTON INDUSTRIAL REAL ESTATE COMPANY; RESORT RENTALS; and WHITCO ENTERPRISES,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed June 16, 1982.

Before: ENGEL and BROWN, Circuit Judges; HORTON, District Judge.*

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*The Honorable Odell Horton, United States District Judge for the Western District of Tennessee, sitting by designation.

PER CURIAM. In 1979, William Kovacs, along with Chem-Dyne Corporation and other business entities, were engaged in the industrial waste disposal business in Hamilton, Ohio. The state of Ohio sued Kovacs individually and as an officer of the defendant corporations, alleging that the defendants had caused water pollution, nuisance conditions and fish kills in violation of Ohio law. Kovacs signed a Stipulation and Judgment Entry in the Butler County Common Pleas Court on July 18, 1979, which enjoined him from causing further pollution and required him to remove all industrial wastes from the premises of Chem-Dyne Corporation within twelve months.

On February 1, 1980, because of noncompliance with the court's earlier judgment, the Common Pleas Court granted Ohio's motion appointing a receiver of Kovacs's non-exempt property and assets along with the assets of related corporate entities. The receiver was also directed to effect the clean-up of the Chem-Dyne site.

Among other things, the state court's order contained the following provisions:

> It is further ordered that Mr. Jack Zettler be appointed receiver of all property or assets, wherever situated, whether real or personal, tangible or intangible, and all interests, whether legal or equitable, in property or assets, of William Kovacs, except to the extent of any property exempt from the control of a receiver by operation of law;
>
> * * *
>
> The receiver shall have power and authority to receive and collect any and all sums of money due

> or owing to the defendant business entities or defendant Kovacs in any manner, whether the same are now due or shall hereafter become due and payable . . . .
>
> * * *
>
> It is further ordered . . . that each of the business entities and defendant Kovacs, and all officers, agents, and employees of the Defendant business entities and defendant Kovacs be enjoined and ordered to cooperate fully with the receiver in the performance of such duties or the exercise of such powers.

Kovacs filed a personal petition in bankruptcy under Chapter 11 of the Bankruptcy Act on July 17, 1980. This action was converted to a straight bankruptcy under Chapter 7 on September 2, 1980, by order of the United States Bankruptcy Court for the Southern District of Ohio.

On September 13, 1980, Ohio filed a motion in the Butler County Court of Common Pleas for a hearing to determine Kovacs's current employment status and income. In response, Kovacs filed a motion with the bankruptcy court, seeking to restrain the proceedings in the Ohio state court. The bankruptcy judge concluded that the State sought the information in state court about Kovacs's current income "as a preliminary to requesting an order from that court which would require that part of debtor's current income be applied" to the receiver's efforts to complete Kovacs's unfulfilled obligation to clean up the industrial wastes from the Chem-Dyne location. The bankruptcy judge determined that Kovacs was entitled to an automatic stay of the state court proceedings under 11 U.S.C. Section 362 (Supp. 1979), and accordingly enjoined the state of Ohio on October 31, 1980 from proceeding further in state court in its

attempt to levy on Kovacs's post-petition earnings. The bankruptcy court's judgment was affirmed on appeal to the United States District Court for the Southern District of Ohio, Judge Spiegel presiding, on April 30, 1981.

The applicable provisions of 11 U.S.C. Section 362 (Supp. 1979) are as follows:

> Section 362. Automatic stay
>
> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of –
>
> * * *
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; . . .
>
> (b) This filing of a petition under section 301, 302, or 303 of this title does not operate as a stay–
>
> * * *
>
> (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power; . . .

The bankruptcy court concluded that the issue of whether Kovacs's obligation to clean up the Chem-Dyne site under the Ohio state court's judgment was dischargeable in bankruptcy was not properly before it, since an

adversary proceeding is required to discharge a debtor's obligation; therefore, it assumed for purposes of argument that it was not dischargeable. The bankruptcy court determined:

> The question presented to us is whether what the State is attempting in [its motion in state court to determine Kovacs's current income] is exempted from the automatic stay of Section 362(a)(2) by reason of Section 362(b)(5). We hold that it is not, even though in its express language Section 362(b)(5) says only that enforcement of a money judgment is subject to the Section 362(a)(2) stay, while other enforcement actions obtained by a governmental unit to enforce its regulatory power are excepted from the stay. Neither prior order of the Butler County Common Pleas Court, it is true, gives the State a money judgment with respect to cleaning up the Chem-Dyne premises, but there is no difference in substance between efforts to collect money from a debtor by securing a court order, and efforts to enforce a money judgment against him. We hold, therefore, that the State is estopped to deny that it is seeking to enforce a money judgment against debtor.

In *In re Mansfield Tire & Rubber Co.*, 660 F.2d 1108 (6th Cir. 1981), this court recently examined the automatic stay provisions of Section 362. The court examined the legislative history of Section 362, which states that governmental action to "prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws" was not subject to the automatic stay. *Id.* at 1112. The court held that the legislative history mandated that the state of Ohio's administration of the worker's compensation claims of the debtor's employees should not be stayed by the bankruptcy court. The court expressly

noted that "[t]he insurance fund, not the debtor's estate, pays the claims for which the employer has paid the premium." *Id.* at 1112-13. The debtor in *Mansfield* was not subject to making payments on its workers' claims that would resemble a money judgment, since payment of claims would come from premium funds already deposited by the debtor with the state, upon which the debtor had no legal claim. Accordingly, the exception to the automatic stay was applicable in that case, because enforcement of a money judgment liability was not imposed upon the debtor, and administration of the claims was pursuant to Ohio's police power.

Marshall v. Tauscher (In re *Tauscher*), 7 B.R. 918 (Bankr. E.D.Wis. 1981), a case discussed in *Mansfield*, held that *assessment* of civil money penalties for child labor violations was non-dischargeable and therefore was subject to the exception to the automatic stay. However, the bankruptcy court also found that the exception would not extend to the *enforcement* of the penalties against the debtor's estate. *See Mansfield, supra* at 1114.

We concur with the bankruptcy court's conclusion that Section 362 indicates a clear intent to permit governmental units to continue to enforce their police power through mandatory injunctions despite the filing of a bankruptcy petition, but to deny those units the power to collect money in their enforcement efforts. We further concur with the conclusion of the bankruptcy court and the district court that the state of Ohio in its state court proceedings was seeking what in essence amounted to a money judgment against Kovacs, which was properly subject to the automatic stay. We note that the state court's order appointing a receiver also ordered that Kovacs turn over all his non-exempt assets to the receiver, and authorized the receiver to collect any sums of money that would become payable to Kovacs in the future. There is very little in substance to distinguish

that order and a money judgment. As noted in In re *Canarico Quarries, Inc.*, 466 F.Supp. 1333, 1340 (D.P.R. 1979), Section 362 "is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate." To permit the state of Ohio to proceed with its state court action would subvert the purpose of the Bankruptcy Act to rehabilitate debtors and to give them relief from harassing creditors.

AFFIRMED.

APPENDIX B

NO. 81-3320

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN RE: WILLIAM LEE KOVACS,
DEBTOR

STATE OF OHIO,
Plaintiff-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a
B & W ENTERPRISES: HAMILTON
INDUSTRIAL REAL ESTATE COMPANY;
RESORT RENTALS; and WHITCO
ENTERPRISES,
Defendants-Appellees.

ORDER DENYING PETITION FOR REHEARING

Filed Aug. 16, 1982

Before: ENGEL and BROWN*; Circuit Judges; HORTON, District Judge.

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*Circuit Judge Brown retired from regular active service under the provisions of 28 U.S.C. Section 371(b) on June 16, 1982, and became a Senior Circuit Judge.

No Judge of the court having moved for rehearing *en banc,* the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ signature deleted
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

IN RE:

WILLIAM LEE KOVACS
dba-B & W Enterprises,
Hamilton Industrial Real
Estate Company, Resort Rentals,
and Whitco Enterprises

Debtor

NO: C-1-81-59
Bankruptcy No. B-1-80-1499

OPINION

Filed Apr. 30, 1981

SPIEGEL, J. :

This is an appeal from a decision of the Bankruptcy Court which held, in effect, that the automatic stay provision of Section 362(a)(2) of the Bankruptcy Code applies to an effort by the State of Ohio to enforce a judgment against the debtor and that the exemption from automatic stay of Section 362(b)(5) does not apply to this case.

In 1979 William Kovacs, along with Chem-Dyne Corporation and another defendant, signed a Stipulation

and Judgment Entry in the Butler County Common Pleas Court which enjoined him from causing pollution and ordered him to remove within twelve months all industrial wastes from the premises of Chem-Dyne Corporation. At that time Kovacs, along with other corporate and non-corporate entities, was engaged in the industrial waste disposal business in Hamilton, Ohio.

In February 1980, because the 1979 order was not being complied with, the Common Pleas Court appointed a receiver of Kovacs' non-exempt property and assets, as well as the property and assets of Chem-Dyne Corporation and other business entities. The Court also ordered the receiver to effect compliance with its 1979 order, including removal and proper disposal of all wastes. In July 1980 Kovacs filed a personal petition under Chapter 11 of the Bankruptcy Code which was converted to a straight bankruptcy under Chapter 7 in September 1980. Soon after this, the debtor moved the Bankruptcy Court for a specific stay order to restrain proceedings brought against him in Common Pleas Court by the State of Ohio for the purpose of obtaining post-petition personal earnings of the debtor to assist in the clean up ordered by the Court in 1979. The Bankruptcy Court granted this motion, and the State's appeal to this Court followed.

Section 362(a)(2) of the Bankruptcy Code, 11 U.S.C. Section 362(a)(2), provides:

> a) Except as provided in subsection b of this section, a petition filed under Section 301, 302, or 303 of this Title operates as a stay, applicable to all entities, of- -
>
> * * *
>
> (2) the enforcement, against the debtor or against property of the

> estate, of a judgment obtained before the commencement of the case under this Title;

The exceptions to this automatic stay are codified in Section 362(b) which provides, in relevant part:

> b) The filing of a petition under Section 301, 302, or 303 of this Title does not operate as a stay--
>
> * * *
>
> (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

The state argues that the judgment entered by the Butler County Common Pleas Court arose from the state's regulatory or police power and was not a money judgment but simply enjoined the debtor from polluting or creating a nuisance, and additionally ordered him to clean up the property in question. Further, the state contends that its efforts to enforce this judgment by seeking the debtor's post-petition personal earnings to assist in the mandated clean-up do not constitute enforcement of a money judgment. Therefore, the State of Ohio concludes that its enforcement proceeding is exempted from the automatic stay provisions of Section 362(a)(2) by the provision of section 362(b)(5) cited above.

In resolving this issue the Bankruptcy Court held:

> Neither prior order of the Butler County Common Pleas Court, it is true, gives the

> state a money judgment with respect to cleaning up the Chem-Dyne premises, but there is no difference in substance between efforts to collect money from a debtor by securing a Court order, and efforts to enforce a money judgment against him. We hold, therefore, that the state is estopped to deny that it is not seeking to enforce a money judgment against debtor.

In Re William Lee Kovacs, No. 1-80-01499 (Bank. Ct. S.D. Ohio, filed October 31, 1980) at 4-5.

Thus, the Bankruptcy Court found that the state was seeking to collect money just as though it were enforcing a money judgment. After a thorough review of the record in this case, including the transcripts of two hearings, we hold this finding of fact not clearly erroneous. (See, *e.g.,* transcript of September 29, 1980 hearing at 11-12.) We also agree with the Bankruptcy Court's conclusion that the exemption provision of Section 362 (b)(5) does not apply, but the automatic stay of Section (a)(2) is applicable because the state's effort is clearly to enforce a judgment obtained before the filing of the Bankruptcy petition.

At oral argument, the state contended that the Bankruptcy Court was mistaken in ordering a specific stay under Section 362(a) when the stay under that section is automatic. Instead, the state urged, the Bankruptcy Court should have considered ordering a stay under Section 105, after requiring the debtor to show irreparable harm, likelihood of success on the merits and no adequate remedy at law. We find this contention without merit. The Bankruptcy Court's order for a specific stay merely confirmed the stay which was in effect as a result of the automatic action of Section 362.

The record shows that the state instituted proceedings against the debtor after the petition in bankruptcy was filed, without obtaining the Bankruptcy Court's permission (Record of September 29, 1980 hearing, at 13). Thus, it was necessary for the Court to order a specific stay, even though the proceeding theoretically was "automatically" stayed.

In the briefs and on oral argument, there was much discussion of whether the debtor's obligations under the 1979 judgment of the Butler County Common Pleas Court are dischargeable in bankruptcy. However, a determination of this issue is not necessary to the issue before us. Both parties at oral argument agreed that a motion to determine dischargeability is pending in the Bankruptcy Court.

Finally, the Court is somewhat disturbed by its impression that the state is attempting to punish Mr. Kovacs for not complying with the 1979 judgment, and, in the process, is subverting the purpose of the Bankruptcy Code. One of the major goals of the Code is to rehabilitate the debtor and to give him a chance to make a "fresh start" insofar as he has debts which are dischargeable. Until a determination on dischargeability is made by the Bankruptcy Court, the debtor is to be given the benefit of all the rehabilitative provisions of the Code. There are criminal sanctions which the state may invoke against Mr. Kovacs if he has violated environmental protection laws and regulations. The Bankruptcy Code may not be used as a substitute for such criminal sanctions. If the Bankruptcy Court holds that the state's claim against Mr. Kovacs is nondischargeable, then the state may seek relief from the stay and proceed against him in Common Pleas Court. Also, we note that the state may currently apply for relief from the automatic stay under the provisions of Section 362(d).

Having determined that the proceedings in Butler County Common Pleas Court to obtain the debtor's post-petition personal earnings are automatically stayed under Section 362(a)(2) of the Bankruptcy Code, we hereby AFFIRM the decision of the Bankruptcy Court.

SO ORDERED.

/s/ signature deleted
United States District Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE

WILLIAM LEE KOVACS
dba/ B & W ENTERPRISES,
HAMILTON COUNTY INDUSTRIAL
REAL ESTATE COMPANY, RESORT
RENTALS and WHITCO
ENTERPRISES
Debtor.

Bankruptcy Case No. 1-80-01499

DECISION

Filed Oct. 31, 1980

At Cincinnati, in said District, on the 31st day of October, 1980:

On July 18, 1980 debtor herein filed a petition for relief under Chapter 11 of the Bankruptcy Code. On September 2, 1980 on the application of debtor, the case was converted to a liquidating bankruptcy under Chapter 7 of the Bankruptcy Code.

Now before us are three matters for decision. The State of Ohio has filed Motion for Leave to Intervene, and also Motion to Dismiss the Proceeding. Also before us is debtor's Motion for Specific Stay Order. In the last mentioned motion, debtor seeks to restrain proceedings

brought by the State of Ohio in the Butler County Common Pleas Court which are designed to recover from the debtor post-petition personal earnings. A hearing was held on the foregoing matters, at the conclusion of which we ordered that the motion of debtor be granted with respect to a then set hearing date in the Butler County Common Pleas Court, and that any other like proceedings be held in abeyance pending the decision which we here issue.

The thrust of both the Motions of the State of Ohio is to oppose any effort by debtor to regain control of the debtor's enterprises which have been placed under the control of a state receiver, (this being the interpretation by the State of the reason that the debtor filed the Chapter 11 proceeding). Such action by the State, however, was mooted upon conversion of the Chapter 11 to a Chapter 7 proceeding. We believe in any case that the controlling issues in these motions are fully dealt with in a consideration of debtor's motion and we therefore proceed to a discussion of it.

The State of Ohio on about September 13, 1980 brought on in the Butler County Common Pleas Court, a Motion for Hearing to Determine Existence of Additional Assets of debtor (hereafter "State's Motion re Assets"). Specifically, the State asked that court to order debtor to appear for a hearing and testimony to elicit information as to his current employment status and income. The State sought that information as a preliminary to requesting an order from that court which would require that part of debtor's current income be applied for a purpose now to be described.

Debtor individually, together with several non-corporate entities and one or more corporate entities, had carried on a business of industrial waste disposal in Hamilton, Ohio. The Environmental Protection Agency

of the State of Ohio in the Butler County Common Pleas Court brought an action against debtor and the other entities, asserting that the disposal operation was not conducted in an acceptable way. There ensued two orders by the Butler County Common Pleas Court, one dated July 18, 1979 and the second, February 4, 1980. In the first order, debtor individually and others agreed to conduct a clean up of the premises employed in the industrial waste disposal operation. In the second order, the court appointed a receiver to perform the clean-up obligations of debtor and the others since they had failed to perform them. The purpose, then, for which State's Motion re Assets was brought was to reach debtor's current income, and to apply that money to the clean-up. It is the State's Motion re Assets against which debtor's Motion for Specific Stay Order is directed.

It is necessary for us to look in some detail at the two orders of the Butler County Common Pleas Court since it is upon them that the respective rights of the parties with which we are here concerned are based. We then must determine how these orders are affected by the several subdivisions of 11 U.S.C. Section 362, and decide the question whether the State has any right to an order by any court requiring that a portion of debtor's current earnings be applied to the clean-up.

The first of the two orders is Stipulation and Judgment Entry of July 19, 1979 which named as defendants Whitten, Kovacs, (debtor herein) and Chem-Dyne Corporation. It was signed personally by the debtor. Under the title "Findings" appear various representations and agreements entered into between the parties to the litigation. The document concludes with a number of orders. Defendants are enjoined from causing "pollution." Defendants are given twelve months within which to remove and dispose of all industrial wastes at the premises. Various subsidiary provisions are included with regard to the manner in which the removal is to be

accomplished, and how that shall be supervised. Defendants are to pay to the Division of Wild Life, Ohio Department of Natural Resources the sum of $75,000.

The second Order was that entered February 4, 1980 where the Butler County Common Pleas Court issued Order Appointing Receiver. That Order appointed Jack Zettler receiver of a number of business entities including Chem-Dyne Corporation, and included all property or assets, real or personal of those business entities. The Order went on to appoint Zettler as receiver of the property or assets of William Kovacs "except to the extent of any property exempt from the control of a receiver by operation of law." Further, the receiver was ordered to effect compliance with the Stipulation and Entry of the Court filed July 18, 1979. The Order states that the receivership shall continue in effect until the wastes had been removed from the premises and disposed of properly.

The State offers considerable authority to support its contention that the obligations imposed upon debtor Kovacs by these two orders are non-dischargeable. Since these obligations are non-dischargeable, says the State, it should be left by the Bankruptcy Court to pursue remedies in furtherance of them. We will assume, but *arguendo* only, in our following discussion that the obligations of the two orders are non-dischargeable.

We turn next to the relevant provisions of 11 U.S.C. Section 362:

> "(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of - -
>
> * * *

> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> * * *
>
> (b) The filing of a petition under section 301, 302 or 303 of this title does not operate as a stay --
>
> * * *
>
> (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power; . . .".

It is self evident that the action taken by the State in trying to reach current earnings of debtor is stayed by 11 U.S.C. Section 362(a)(2), for it has been the position of the State throughout the present motion proceedings that the rights which it is here seeking to enforce stem from the prior orders of the Butler County Common Pleas Court. The question presented to us is whether what the State is attempting in State's Motion re Assets is exempted from the automatic stay of Section 362(a)(2) by reason of Section 362(b)(5). We hold that it is not, even though in its express language Section 362(b)(5) says only that enforcement of a money judgment is subject to the Section 362(a)(2) stay, while other enforcement actions obtained by a governmental unit to enforce its regulatory power are excepted from the stay. Neither prior order of the Butler County Common Pleas Court it is true, gives the State a money judgment with respect to cleaning up the Chem-Dyne premises, but

there is no difference in substance between efforts to collect money from a debtor by securing a court order, and efforts to enforce a money judgment against him. We hold, therefore, that the State is estopped to deny that it is [not] seeking to enforce a money judgment against debtor.

In reaching that conclusion, we have looked to the legislative history of the portions of Section 362 under discussion. There we find a legislative intent to draw a line, on the one hand permitting governmental units to enforce their police and regulatory powers by mandatory injunctions, but on the other hand refusing those units the right to collect money in such enforcement efforts. The relevant House and Senate Reports say with respect to Section 362(b)(4) and (5):

> "Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court and since they constitute a fund out of which all creditors are entitled to

> share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.
>
> House Report No. 95-595, 95 Cong., 1st Sess. (1977) 342-3; Senate Report No. 95-989, 95th Cong., 2d.Sess. (1978) 51-2.

Of similar import is the following:

> "Section 362(b)(4) indicates that the stay under section 362(a)(1) does not apply to affect the commencement or continuation of an action or proceeding by a governmental unit to enforce the governmental unit's police or regulatory power. This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate."

124 Cong. Rec. H. 11, 092 (Sept. 28, 1978); S 17, 409 (Oct. 6, 1978). See also 2 Collier on Bankruptcy (15th ed.) 362-39. While it is true that the State is trying to collect a portion of debtor's post-filing wages, and not to participate in the bankruptcy estate on a preferred basis, this legislative history is relevant in giving insight into the scope intended by Congress for Section 362(b)(4) and (5). It makes clear a general intent to distinguish injunctive and monetary relief.

The State argues that the law is or should be that the automatic stay of Section 362 does not apply to efforts to enforce non-dischargeable obligations. In support of this position, the State cites cases typified by *Brennan v. T & T Trucking, Inc.*, 396 F. Supp. 615 (D.C. Okla, 1975). Its cases are, however, clearly distinguishable. Firstly, none were decided under 11 U.S.C. Section 362 of the Bankruptcy Code, but rather involved application of Bankruptcy Rule 401 under the predecessor Bankruptcy Act. Secondly, in the case before us the State is seeking monetary relief, while in its cited cases, the question involved efforts by the governmental unit to secure injunctive relief.

In its memorandum in support of Motion To Dismiss, the State of Ohio says:

> "The key to the State's position is the non-dischargeable nature of the obligation imposed upon Kovacs by the July 18, 1979 Stipulation and Judgment Entry. Since it is non-dischargeable Kovacs cannot use a Title 11 proceeding to escape the performance of the duty."

The State suggests that its efforts in the Butler County Common Pleas Court should not or cannot be stayed because the duties of Kovacs arising under the Stipulation and Judgment Entry of July 18, 1979 are non-dischargeable. The State thus brings us to an interface between the stay provisions of the Bankruptcy Code 11 U.S.C. Section 362 and the dischargeability section, 11 U.S.C. Section 523. While we had earlier in our decision accepted for purposes of argument that the State is proceeding on a non-dischargeable obligation, we will not here decide that question on the merits. Bankruptcy Rule 701(7) expressly provides that the determination of the dischargeability of a debt is to be determined in an

adversary proceeding. While the State attempts to avoid this point by contending that it is not a claimant, we suggest to the State that, certainly to the extent it desires monetary relief, it maintains that position at its peril. One of the indisputable expansions wrought in the law by the Congress when it enacted the Bankruptcy Code, was in the definition of the word "claim" as found at 11 U.S.C. Section 101(4). In doing so it was the intent of Congress to enhance the "fresh start" given a debtor.

In light of the foregoing discussion we conclude that debtor is correct in his contentions and should prevail on his motion. The State will be stayed from proceeding further in the Butler County Common Pleas Court in attempting to levy on post-filing wages of debtor. Furthermore, since important rights arising under the Bankruptcy laws of the United States are involved, the Motion to Dismiss filed by the State of Ohio will be denied. By this remark it is our intention to dispose of the suggestion of the State of Ohio that this is an appropriate case for abstention. We also deny the State's Motion to Intervene. Intervention is unnecessary to afford to the State of Ohio an opportunity to take those actions in this court which it deems necessary to protect its legitimate rights, particularly since the case has been converted from Chapter 11 to Chapter 7.

/s/ signature deleted
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE

WILLIAM LEE KOVACS
dba/ B & W ENTERPRISES,
HAMILTON COUNTY [sic] INDUSTRIAL
REAL ESTATE COMPANY, RESORT
RENTALS and WHITCO
ENTERPRISES

Debtor

Bankruptcy Case No. 1-80-01499

ORDER ON STATE'S MOTION TO DISMISS THE PROCEEDING, STATE'S MOTION FOR LEAVE TO INTERVENE AND DEBTOR'S MOTION FOR SPECIFIC STAY ORDER.

Filed Oct. 31, 1980

At Cincinnati, in said District,

These motions having come on for hearing before Bankruptcy Judge Burton Perlman, and the issues having been duly heard,

It is ORDERED AND ADJUDGED, for the reasons stated in Decision filed simultaneously herewith, that the issues are found as follows:

1. Motion by State of Ohio for Leave to Intervene is denied.

2. Motion by State of Ohio to Dismiss the Proceedings is denied.

3. Motion by Debtor for Specific Stay Order is granted. The State of Ohio is stayed from proceeding further in Butler County Common Pleas Court in attempting to levy on post-filing wages of debtor.

/s/ signature deleted
United States Bankruptcy Judge

APPENDIX E

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

STATE OF OHIO, ex rel.
WILLIAM J. BROWN,
ATTORNEY GENERAL OF OHIO,
et al.,
Plaintiffs,

v. **v.**

CHEM–DYNE CORPORATION,
et al.,
Defendants.

Case No. CV76-09-0834

JUDGE MARRS

ORDER APPOINTING RECEIVER

Filed Feb. 4, 1980

Having on February 1, 1980, granted plaintiffs' motion for the appointment of a receiver, subject to further order of this court designating a specific receiver and defining the specific authority to be exercised by such receiver,

IT IS HEREBY ORDERED that Mr. Jack Zettler , who is a resident of this state and not a party herein, be appointed receiver of Chem-Dyne Corporation, Spray-Dyne Corporation, Transenvironmental Corporation, K.O.I. Petroleum Company, Inc., Whitco Enterprises, Inc., B & W Enterprises, Hamilton Industrial

Real Estate Company (hereinafter the "business entities"), and of all property or assets, wherever situated, whether real or personal, tangible or intangible, and all interests, whether legal or equitable, in property or assets, of the aforementioned business entities;

IT IS FURTHER ORDERED that Mr. Jack Zettler be appointed receiver of all property or assets, wherever situated, whether real or personal, tangible or intangible, and all interests, whether legal or equitable, in property or assets, of William Kovacs, except to the extent of any property exempt from the control of a receiver by operation of law;

IT IS FURTHER ORDERED that the receiver shall forthwith file with the clerk of this court a bond in the sum of $200,000 with surety to be approved by this court conditioned that he will faithfully discharge the duties of receiver in this action and obey the orders of the court herein;

IT IS FURTHER ORDERED that until further order of this court the receiver be and hereby is authorized to take and have complete and exclusive control, possession and custody of all assets and property of the defendant business entities and of defendant Kovacs;

IT IS FURTHER ORDERED that each of the defendant business entities and defendant Kovacs and any persons acting under their direction shall upon presentation of a copy of this order deliver to the possession, custody and control of the receiver any and all property or assets in their possession or under their control, and that all persons are enjoined from in any way disturbing the possession, custody, or control of the receiver and from prosecuting any actions which affect the property or assets of the defendant business entities and defendant Kovacs.

IT IS FURTHER ORDERED that the receiver is to effect compliance as expeditiously as practicable with all of the orders entered by this court in its stipulation and judgment entry filed in this case on July 18, 1979, such orders being as follows:

(1) The Defendants and their employees and agents are permanently enjoined and restrained from causing "pollution", as that term is defined in Section 6111.01(A) of the Revised Code, of "waters of the state", as that term is defined in Section 6111.01(H) of the Revised Code.

(2) The defendants and their employees and agents are permanently enjoined and restrained from causing or allowing the emissions from the facilities at 500 Ford Boulevard of noxious exhalations or noisome or offensive smells which are injurious to the health, comfort and property of individuals and the public.

(3) Within twelve (12) months of the signing of this order the Defendants and their employees and agents are to remove and dispose of all industrial wastes and/or other wastes as described in Finding No. Seven (7) from the premises at 500 Ford Boulevard. The removal is to be accomplished at the rate of a net reduction of 75,000 gallons of liquids and 340 drums of solid and semisolid sludges per month. Compliance with this schedule shall be determined every three (3) months on the basis of the average rate of reduction over the previous three (3) months, except

that during the last three (3) months the net rate must proceed at a rate of at least 75,000 gallons of liquid and 340 drums of solid and semisolid sludge in each month.

(4) The Defendants and their employees and agents are to allow the Director of the Ohio Environmental Protection Agency and/or his agents and representatives to conduct a quarterly inventory of industrial wastes and/or other wastes on the premises at 500 Ford Boulevard, and to supply to the director and/or his agents and representatives such additional information as the Director and/or his agents and representatives reasonably determine is necessary in order to assure that the industrial wastes and/or other wastes are being removed and disposed of from the premises at 500 Ford Boulevard at the rate and in accordance with the schedule established in Order No. Three (3).

(5) The removal and disposal of the industrial wastes and/or other wastes required by Order No. Three (3) shall be performed under the supervision and inspection of the Director of the Environmental Protection Agency and/or his agents and representatives.

(6) The Defendants and their employees and agents shall grant the Director of Ohio EPA and/or his agents and representatives access to enter the premises at 500 Ford Boulevard during normal busi-

ness hours for the purpose of assuring that the removal and disposal of the wastes contained in Order No. Three (3) is being conducted in accordance with such additional terms and conditions as required by the Director and/or his agents and representatives pursuant to Order No. Four (4) and Order No. Five (5). The Defendants shall grant such access during normal business hours to the director and/or his agents and representatives without the need for a search warrant.

(7) Upon the removal and disposal of all industrial wastes and other wastes as required by Order No. Three (3), the Defendants and their employees and agents are further permanently enjoined, restrained and ordered to refrain from any activity which would cause the importation into the premises at 500 Ford Boulevard, or the generation on the premises at 500 Ford Boulevard, of any industrial or other wastes except those normally incident to the operation of offices and maintenance of trucks and trailers. The Defendants are further permanently enjoined, restrained and ordered to refrain from having any financial, legal, equitable or other interest in any activity which would cause the importation onto the premises at 500 Ford Boulevard or the generation on the premises at 500 Ford Boulevard of any industrial or other wastes except those normally incident to the operation of offices and maintenance of trucks and trailers.

(8) The Defendants shall pay to the Division of Wildlife, Ohio Department of Natural Resources the sum of seventy-five thousand dollars ($75,000) with interest thereon at the rate of six percent (6%) as provided by law. By agreement of the Division of Wildlife and the Defendant, said judgment shall be paid according to the following terms and conditions:

(a) On or before September 1, 1979, the Defendants will pay to the order of the Division of Wildlife the sum of twenty-five thousand dollars ($25,000). Five thousand dollars ($5,000) of said amount shall be paid within seven (7) days of the date of this Entry. The remaining twenty thousand dollars ($20,000) plus six percent (6%) per annum interest shall be paid by September 1, 1979.

(b) In addition, the Defendants will pay to the order of the Division of Wildlife twenty-five (25) consecutive monthly installments, each in the amount of two thousand dollars ($2,000) principal amount, plus interest on the unpaid balance at the rate of six percent (6%) per annum from the date of this Entry, computed as of the date of each payment; the first monthly installment of two thousand dollars ($2,000) plus interest, a total of two thousand, two hundred and fifty dollars ($2,250) shall be payable to the order of the Division of Wildlife on or before October 1, 1979 with subsequent installments due on or before the first day of each month thereafter with the remaining unpaid balance of principal and interest payable on or before October 1, 1981.

(c) In the event that any insurance proceeds are paid to the Defendants under any contract providing liability insurance for the Defendants in settlement of the injuries and damages incurred by the State of Ohio, Division of Wildlife, as referred to above in paragraphs Four (4) and Five (5) of the Findings, such proceeds shall be immediately paid over to the order of the Division of Wildlife, to be credited toward the unpaid balance on the principal amount. The payment of any such proceeds to the Division of Wildlife shall be in addition to the $25,000 payment referred to in subparagraph (a) above. In the event that any such proceeds paid to the Division of Wildlife are not sufficient to satisfy the entire unpaid balance on the principal amount, then the Defendants shall continue to pay the monthly installments of two thousand dollars ($2,000) plus interest as provided in subparagraph (b) above until the unpaid balance on the principal amount is extinguished.

(d) If the Defendants shall fail to pay any installments of principal or interest, or any part thereof, under this paragrpah (8) when it becomes due, the Division of Wildlife shall promptly notify the Defendants of such default and shall afford Defendants ten (10) days after such notification within which to cure the default. If the Defendants default on a payment on more than three occasions, whether the default is cured or not, or if the Defendants fail to correct the default

within ten (10) days after the notification provided for herein, then all of the installments and amounts remaining unpaid shall immediately become due and payable in full.

(e) Both principal and interest under the provisions of this paragraph are payble to the order of DIVISON OF WILDLIFE, OHIO DEPARTMENT OF NATURAL RESOURCES, at 1952 Belcher Drive, Building C, Columbus, Ohio 43224, attention: Richard Francis;

(f) The notice from the Division of Wildlife to the Defendants required under subparagraph (d) shall be in writing and shall be by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

Chem-Dyne Corporation
500 Ford Boulevard
Hamilton, Ohio 45011

Attention: Bruce A. Whitten

Any notice made in accordance with this subparagraph shall be deemed notice to all and to each of the Defendants.

IT IS FURTHER ORDERED that the receiver is granted the following authority to implement the provisions of this Court's July 18, 1979 stipulation and judgment entry:

1. The receiver shall have authority to direct, manage, and control all activities, operations, and management of those business entities for which a receiver is

appointed herein. The receiver shall have authority to carry on the operations of such business entities.

2. The receiver shall have power and authority to make contracts necessary to implement the provisions of the July 18, 1979 judgment entry and to carry on any of the businesses for which the receiver is appointed herein. The receiver shall have power and authority to procure the services of any individual, partnership, corporation, or other organization, association, or entity whenever appropriate, necessary, or helpful to implement the orders of this court.

3. The receiver shall have power and authority to borrow money, execute mortgages or give other security, and buy on credit in the name of any of the business entities for which a receiver is appointed herein.

4. The receiver shall have power and authority to make such payments and disbursements as may be necessary and proper to carry into effect the judgment entry of July 18, 1979, or to carry on the operations of the business entities, including the authority to make payments of debt entitled to priority.

5. The receiver shall have power and authority to receive and collect any and all sums of money due or owing to the defendant business entities or defendant Kovacs in any manner, whether the same are now due or shall hereafter become due and payable, and the receiver shall have power and authority to do such things and enter into such agreements in connection with the management, care, and preservation of the assets and properties of the defendant business entities and defendant Kovacs as he may deem advisable, and is authorized to incur such expenses and make such disbursements as may in his judgment be advisable or necessary in connection with the care, preservation and maintenance of the properties and assets.

6. The receiver shall have power and authority to issue receivers certificates.

7. The receiver shall have power and authority to institute, prosecute and defend, compromise, adjust, intervene in or become party to such actions or proceedings in state or federal courts as may in his opinion be necessary or proper for the implementation of the terms of the July 18, 1979 judgment entry and of the terms of this order, and likewise to defend, compromise or adjust or otherwise dispose of any and all actions or proceedings instituted against him as receiver or against the defendant business entities and defendant Kovacs, and also to appear in and conduct the defense of any suit or adjust or compromise any actions or proceedings now pending in any court by or against the defendant business entities and defendant Kovacs where such prosecution, defense or other disposition of such actions or proceedings will in the judgment of the receiver be advisable or proper for the implementation of this court's judgment entry of July 18, 1979.

8. Whenever necessary to implement the provisions of the July 18, 1979 judgment entry of this court, the receiver shall have power and authority to sell, lease, or otherwise liquidate or dispose of any assets herein committed to the care and possession of the receiver.

9. The receiver shall have power and authority to petition this court for instructions regarding the exercise of any powers herein provided or duties herein established.

IT IS FURTHER ORDERED that the receivership herein provided shall continue in effect with respect to the defendant business entities and defendant Kovacs until such time as all industrial and/or other wastes, whether solid, liquid, or semi-sold sludge in form, have been removed from the premises at 500 Ford Boulevard,

Hamilton, Ohio and properly disposed of in a lawful manner, and until a formal determination by this court that there has been full compliance with all provisions of the July 18, 1979 judgment entry.

IT IS FURTHER ORDERED that each defendant business entity and defendant Kovacs submit to the receiver within fourteen days of the entry of this order appointing a receiver a report listing by item all property and assets of any kind whatsoever, wherever situated, of such Defendant indicating the location of such property or assets conveyed or otherwise transferred by such defendant Kovacs since September, 1979, and identifying the person to whom or the entity to which such properties or assets were transferred and the present location of such properties or assets.

IT IS FURTHER ORDERED that each of the defendant business entities and defendant Kovacs, and all officers, agents, and employees of the defendant business entities and defendant Kovacs, be enjoined and restrained from in any manner interfering with the receiver in the performance of any duties or the exercise of any powers established by the provisions of this order, and that each of the defendant business entities and defendant Kovacs, and all officers, agents, and employees of the Defendant business entities and defendant Kovacs be enjoined and ordered to cooperate fully with the receiver in the performance of such duties or the exercise of such powers.

IT IS FURTHER ORDERED that within thirty days of this appointment the receiver shall submit to the court, with a copy supplied to the parties, a report listing all chemical wastes and other wastes on the premises at 500 Ford Boulevard and containing the receiver's recommendations for the lawful disposal of such materials. Any materials which the receiver may wish to dispose of

prior to the submission of the receiver's report to this court and prior to this court's approval of the recommendations contained therein, shall be disposed of only after the receiver has obtained the approval of the Director of the Ohio Environmental Protection Agency or his representative.

IT IS FURTHER ORDERED that the receiver shall submit to the court a monthly compliance report detailing the receiver's progress in implementing this Court's July 18, 1979 judgment entry in this case.

DATE February 4, 1980
/s/ JUDGE MARRS

APPENDIX F

STATE OF OHIO, BUTLER COUNTY
COURT OF COMMON PLEAS

STATE OF OHIO, ex rel,
Plaintiffs

vs.

CHEM DYNE INC., et al,
Defendants

CASE NO. CV76-09-0834

OPINION

Filed February 1, 1980

MARRS, J.

This matter coming on this day for hearing to the Court upon the application of the State of Ohio for an appointment of a Receiver after a consent judgment had been filed in this cause. Evidence was presented, a number of exhibits introduced and arguments were made by counsel.

On the 18th day of July, 1979, a consent decree was filed in this cause and a Stipulation and Judgment Entry signed by Defendant Bruce Whitten, William L. Kovacs, Defendant, and Louis F. Gilligan, their attorney; Dennis Muchnicki, Assistant Attorney General for the State of Ohio and Lester W. Koehler, Law Director for the City of Hamilton. It is Stipulated by this entry that Chem Dyne Corporation, also a defendant in this action, would be bound by its terms and the entry further provided that if defendants Whitten or Kovacs sell their interest in Chem-

Dyne Corporation, that the Stipulation and liability would be assumed by Defendants Whitten, Kovacs, or Chem Dyne Corporation. (See 9 of Stipulation and Judgment Entry).

The Stipulation and Judgment Entry has two major thrusts, namely the payment of a money judgment in the sum of $75,000 in scheduled payments (see 8), and the second thrust being in the nature of a mandatory orderly removal and disposal of "all industrial waste as described in Finding No. 7." The removal was to be systematic subject to a quarterly inventory so that ultimately the premises would be free and clear of the objectionable material.

The evidence offered by the State of Ohio clearly showed that with regard to the money judgment, the terms of the Stipulation were not complied with by the respective defendants. Evidence was offered by the defendant Kovacs to show that attempts were made by the respective defendants to satisfy the terms of the Stipulation but names appeared upon the checks after there had been a change in ownership and officers of the Corporation and said checks were not honored. However, it is to be noted that no attempt was made by the Defendant Kovacs or the Chem Dyne Corporation to properly issue the checks that had not been honored, thus the default in the payments.

It is the finding of this Court that the Defendants have violated the agreement and Stipulation by not paying the State of Ohio the sums of money due under the Judgment Decree.

Considering the second alleged violation with regard to the removal and disposal of the waste materials, the Court heard evidence from the State showing that from the inventory as initially furnished, with the tallying

of additional incoming and outgoing material, that there was very little change, if any, in the beginning inventory of July 19th, 1979 and that of November 19, 1979 and January 22, 1980. Evidence offered by the defendants indicated that the original estimates of inventory were nothing more than "guesstimates" and were not accurate. Additional estimates were offered in the form of pictures, (see exhibits) showing that materials were removed. The State claims that the inventory areas merely reflect removal from one area to another area or that the drums were piled higher in order to clear a specific location.

The Court would find that with regard to the alleged violations with regard to the disposal and removal of the waste material, that there has likewise been a gross abuse by the Defendants of not properly recording the initial inventory and the allowance of additional disposal material (objectionable waste) to enter the premises and the continued operation of the business was a flagrant disregard of the Stipulation and Judgment Decree.

Having found the Defendants in violation of both phases of this Stipulation and Judgment Entry, the Court is faced with the serious matter or question as to whether a Receiver should be appointed under Section 2735.01 of the Revised Code to carry out the July 18th, 1979 entry.

Mr. William Kovacs, as the evidence that was initially heard by this Court in 1976 and again reiterated throughout this proceeding, is indeed an entrepreneur, hard working, and a believer in the free enterprise system. His efforts have produced several corporations that furnish a service to a great number of other corporations in the removal and disposal of corporate waste. These endeavors have apparently been quite profitable and the corporate empires he has built deals in large sums of money. The chemical engineering expertise of Mr. Kovacs is likewise a great factor in the disposal of the various

chemical waste with which his companies are intricately involved. Counsel for the Defendant has reminded the Court that "Receivership is Dictatorship" and would take away from Defendant Kovacs his right to deal in his corporate capacity with that subject matter which he has devoted all of his time and his life.

The Court in disposing of the issue of Receivership would note the differences between the type of business in which the respective Defendants are involved and that of the ordinary private corporation or enterprise. The Court would note that the Defendants in this case are engaged in a business that definitely affects this entire community and conceivably the water for this entire area as well as the wild life, natural resources of the area, and the fish in the streams. Mr. Kovacs is engaged in businesses that very definitely have a wide spread effect on community life and its daily operation and is affected with a public interest which invokes the equity powers of the Court.

This Court has found that the defendants have failed in their agreement to cooperate with the Environmental Protection Agencies and have likewise failed to pay to the State of Ohio money which they have acknowledged due for the killing of wild life, the pollution of the local streams and the killing of fish.

This Court would further feel that proper supervision is definitely in order and that the companies owned and operated by the Chem Dyne chain must be supervised and controlled to the extent of the Judgment Entry and Stipulations of July 18th, 1979 and to that end this Court would order that a Receiver be appointed to accomplish what was agreed upon between the parties.

A formal entry may be presented in accordance herewith and the appointment of a Receiver be effected after conference on Monday, February 4th, 1980 at 10:00 a.m.

APPENDIX G

IN THE

COURT OF COMMON PLEAS

BUTLER COUNTY, OHIO

STATE OF OHIO, et al.,
Plaintiffs,

—vs—

CHEM–DYNE CORPORATION, et al.,
Defendants.

Case No. CV76-09-0834

Judge Marrs

STIPULATION AND JUDGMENT ENTRY

FINDINGS

(1) Defendants Whitten, Kovacs and Chem-Dyne Corporation, and their employees and agents are involved in the business of waste hauling, recycling and redistribution at their facility located at 500 Ford Boulevard, Hamilton, Ohio. Defendant Spray-Dyne produces antifreeze at the facility. These four Defendants shall collectively be referred to hereafter as "the Defendants."

(2) The Defendants have never received from the Ohio Environmental Protection Agency or U.S. EPA a National Pollutant Discharge Elimination System (hereinafter "NPDES") permit.

(3) Plaintiffs allege and Defendants deny that the Defendants and their employees and their agents have violated Sections 6111.04 and 6111.07 of the Revised Code by negligently causing the placement of "industrial wastes" and/or "other wastes", as those terms are defined in Section 6111.01(C) and (D) of the Revised Code (hereinafter "industrial wastes" and "other wastes"), in a location where, on or about April 24, 1976; July 23, 1976; August 3, 1976; August 5, 1976; August 6, 1976; September 17, 1976; and September 23, 1976, they caused "pollution", as that term is defined in Section 6111.01(A) of the Revised Code, of "waters of the state", as that term is defined in Section 6111.01(H) of the Revised Code, specifically the Hamilton Hydraulic Canal and the Great Miami River.

(4) Plaintiffs allege and Defendants deny that the Defendants and their employees and agents negligently permitted industrial wastes and/or other wastes to enter and travel through a storm sewer system and its conduits located upon their premises and into the Hamilton Hydraulic Canal, a tributary of the Great Miami River, a watercourse of the State of Ohio.

(5) Plaintiffs allege and Defendants deny that the actions of the Defendants as alleged in Finding No. Four (4) were the direct and proximate cause of the death of over eighteen thousand, one hundred and forty-one (18,141) wild animals of the State of Ohio, as defined in Section 1531.01(X) of the Revised Code, on April 23, 1976; one million, seventy-eight thousand, forty-seven (1,078,047) wild animals, as defined in Section 1531.01 (X) of the Revised Code, on July 22, 1976; and seven hundred, thirty-eight (738) wild animals, as defined in Section 1531.01(X) of the Revised Code, on August 13, 1976.

(6) Plaintiffs allege and Defendants deny that the Defendants and their employees and agents have conducted their business at 500 Ford Boulevard so as to occasion the emission of noxious exhalations or noisome or offensive smells which are injurious to the health, comfort and property of individuals and the public in violation of Section 3767.12 of the Revised Code.

(7) The Defendants currently estimate that they have the following amounts of industrial wastes and/or other wastes stored at their facilities at 500 Ford Boulevard: 850,000 gallons in liquid form and 4,000 barrels of solid or semisolid sludges.

(8) Plaintiffs and Defendants are entering into this Stipulation and Judgment Entry in order to compromise all disputes and/or claims or causes of action asserted in the Complaint or which could have been asserted by the Plaintiffs to the date hereof arising from any action or actions of the Defendants.

(9) By entering into this Stipulation and Judgment Entry the Defendants do not admit any of the allegations of the Complaint and continue to deny same.

(10) Plaintiffs and Defendants agree that in any action to enforce any of the provisions of this Stipulation and Judgment Entry, the Defendants may raise at that time the issue of whether they are entitled to raise a defense that its violation of the terms hereof resulted from causes beyond their control, such as, but not limited to, acts of God, of public enemies, conflicting orders of an entity having police power and jurisdiction over any of the Defendants, or impossibility of any of the Defendants of the performance of the terms hereof. While Plaintiffs disagree that such a defense exists, the parties do, however, agree and stipulate that it is premature at this time to raise and adjudicate the existence of such a defense, and that the appropriate time to

adjudicate the existence of such a defense is at such time that Plaintiffs seek to enforce the provisions of this Stipulation and Judgment Entry.

ORDERS

WHEREFORE, THE PARTIES HEREBY CONSENT TO AND THE COURT HEREBY ORDERS THAT:

(1) The Defendants and their employees and agents are permanently enjoined and restrained from causing "pollution", as that term is defined in Section 6111.01(A) of the Revised Code, of "waters of the state", as that term is defined in Section 6111.01(H) of the Revised Code.

(2) The Defendants and their employees and agents are permanently enjoined and restrained from causing or allowing the emission from the facilities at 500 Ford Boulevard of noxious exhalations or noisome or offensive smells which are injurious to the health, comfort and property of individuals and the public.

(3) Within twelve (12) months of the signing of this order the Defendants and their employees and agents are to remove and dispose of all industrial wastes and/or other wastes as described in Finding No. Seven (7) from the premises at 500 Ford Boulevard. The removal is to be accomplished at the rate of a net reduction of 75,000 gallons of liquids and 340 drums of solid and semisolid sludges per month. Complaince with this schedule shall be determined every three (3) months on the basis of the average rate of reduction over the previous three (3) months, except that during the last three (3) months the

net rate of reduction must proceed at a rate of at least 75,000 gallons of liquid and 340 drums of solid and semisolid sludge in each month.

(4) The Defendants and their employees and agents are to allow the Director of the Ohio Environmental Protection Agency and/or his agents and representatives to conduct a quarterly inventory of industrial wastes and/or other wastes on the premises at 500 Ford Boulevard, and to supply to the Director and/or his agents and representatives such additional information as the Director and/or his agents and representatives reasonably determine is necessary in order to assure that the industrial wastes and/or other wastes are being removed and disposed from the premises at 500 Ford Boulevard at the rate and in accordance with the schedule established in Order No. Three (3).

(5) The removal and disposal of the industrial wastes and/or other wastes required by Order No. Three (3) shall be performed under the supervision and inspection of the Director of the Environmental Protection Agency and/or his agents and representatives.

(6) The Defendants and their employees and agents shall grant the Director of Ohio EPA and/or his agents and representatives access to enter the premises at 500 Ford Boulevard during normal business hours for the purpose of assuring that the removal and disposal of the wastes contained in Order No. Three (3) is being conducted in accordance with the compliance schedule contained in Order No. Three (3) and in accordance with such additional terms and conditions as required by the Director and/or his agents and representatives pursuant to Order No. Four (4) and Order No. Five (5). The Defendants shall grant such access during normal business hours to the Director and/or his agents and representatives without the need for a search warrant.

(7) Upon the removal and disposal of all industrial wastes and other wastes as required by Order No. Three (3), the Defendants and their employees and agents are further permanently enjoined, restrained and ordered to refrain from any activity which would cause the importation into the premises at 500 Ford Boulevard, or the generation on the premises at 500 Ford Boulevard of any industrial or other wastes except those normally incident to the operation of offices and maintenance of trucks and trailers. The Defendants are further permanently enjoined, restrained and ordered to refrain from having any financial, legal, equitable or other interest in any activity which would cause the importation onto the premises at 500 Ford Boulevard or the generation on the premises at 500 Ford Boulevard of any industrial or other wastes except those normally incident to the operation of offices and maintenance of trucks and trailers.

(8) The Defendants shall pay to the Divison of Wildlife Ohio Department of Natural Resources, the sum of seventy-five thousand dollars ($75,000) with interest thereon at the rate of six percent (6%) as provided by law. By agreement of the Division of Wildlife and the Defendants, said judgment shall be paid according to the following terms and conditions:

(a) On or before September 1, 1979, the Defendants will pay to the order of the Division of Wildlife the sum of twenty-five thousand dollars ($25,000). Five thousand dollars ($5,000) of said amount shall be paid within seven (7) days of the date of this Entry. The remaining twenty thousand dollars ($20,000) plus six percent (6%) per annum interest shall be paid by September 1, 1979.

(b) In addition, the Defendants will pay to the order of the Division of Wildlife twenty-five (25) consecutive monthly installments, each in the amount of

two thousand dollars ($2,000) principal amount, plus interest on the unpaid balance at the rate of six percent (6%) per annum from the date of this Entry, computed as of the date of each payment; the first monthly installment of two thousand dollars ($2,000) plus interest, a total of two thousand, two hundred and fifty dollars ($2,250) shall be payable to the order of the Division of Wildlife on or before October 1, 1979, with subsequent installments due on or before the first day of each month thereafter with the remaining unpaid balance of principal and interest payable on or before October 1, 1981.

(c) In the event that any insurance proceeds are paid to the Defendants under any contract providing liability insurance for the Defendants in settlement of the injuries and damages incurred by the State of Ohio, Divison of Wildlife, as referred to above in paragraphs Four (4) and Five (5) of the Findings, such proceeds shall be immediately paid over to the order of the Division of Wildlife, to be credited toward the unpaid balance on the principal amount. The payment of any such proceeds to the Division of Wildlife shall be in addition to the $25,000 payment referred to in subparagraph (a) above. In the event that any such proceeds paid to the Division of Wildlife are not sufficient to satisfy the entire unpaid balance on the principal amount, then the Defendants shall continue to pay the monthly installments of two thousand dollars ($2,000) plus interest as provided in subparagraph (b) above until the unpaid balance on the principal amount is extinguished.

(d) If the Defendants shall fail to pay any installment of principal or interest, or any part thereof, under this paragraph (8) when it becomes due, the Division of Wildlife shall promptly notify the Defendants of such default and shall afford Defendants ten (10) days after such notification within which to cure the default. If the Defendants default on a payment on more than three occasions, whether the default is cured or not, or

if the Defendants fail to correct the default within ten (10) days after the notification provided for herein, then all of the installments and amounts remaining unpaid shall immediately become due and payable in full.

(e) Both principal and interest under the provisions of this paragraph are payable to the order of DIVISION OF WILDLIFE, OHIO DEPARTMENT OF NATURAL RESOURCES, AT 1952 Belcher Drive, Building C, Columbus, Ohio 43224, attention: Richard Francis;

(f) The notice from the Division of Wildlife to the Defendants required under subparagraph (d) shall be in writing and shall be by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

Chem-Dyne Corporation
500 Ford Boulevard
Hamilton, Ohio 45011

Attention: Bruce A. Whitten

Any notice made in accordance with this subparagraph shall be deemed notice to all and to each of the Defendants.

(9) In the event either Defendants WHITTEN or KOVACS would sell their entire interest in CHEM–DYNE CORPORATION and the property located at 500 Ford Boulevard, Hamilton, Ohio, in its entirety, to the other, the Plaintiffs hereby agree to release the selling Defendants WHITTEN or KOVACS as the case may be from the terms of this Stipulation and Judgment Entry, if the entire liability is assumed by the remaining Defendant WHITTEN or KOVACS and CHEM–DYNE CORPORATION.

In the event either the Defendants WHITTEN and KOVACS individually or jointly wish to sell all or any part of their ownership interest in CHEM–DYNE CORPORATION to a third party, the Plaintiffs shall have the right to determine at the time of said sale whether to release the selling Defendants WHITTEN or KOVACS jointly or individually as the case may be from the obligations hereunder. Furthermore, in the event of such a sale, the Defendants are hereby ordered to require that any purchaser assume the liability of the selling Defendant(s).

(10) The Defendants' Third-Party Complaint against Third Party Defendant City of Hamilton is dismissed with prejudice.

APPROVED:

signature lines deleted.

APPENDIX H

RELEVANT PROVISIONS OF THE BANKRUPTCY REFORM ACT OF 1978

11 U.S.C. Section 105

(a) The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

(b) Notwithstanding subsection (a) of this section, a bankruptcy court may not appoint a receiver in a case under this title.

11 U.S.C. Section 362

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of—

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay–

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a)(7) of this section, of the setoff of any mutual debt and claim that are commodity futures contracts, forward commodity contracts, leverage transactions, options, warrants, rights to purchase or sell commodity futures contracts or securities, or options to purchase or sell commodities or securities;

(7) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by said Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units; or

(8) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency.

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;
(B) the time the case is dismissed; and
(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property, if—

(A) the debtor does not have an equity in such property; and
(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after

notice and a hearing, orders such stay continued in effect pending, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. If the hearing under this subsection is a preliminary hearing—

(1) the court shall order such stay so continued if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the final hearing under subsection (d) of this section; and

(2) such final hearing shall be commenced within thirty days after such preliminary hearing.

(f) The court, without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

CERTIFICATE OF SERVICE

I certify that three copies of this appendices in support of petition for writ of certiorari were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first-class postage prepaid, this 12th day of November, 1982 to John A. Garretson, 118 S. Second Street, Hamilton, Ohio 45011; to William H. Eder, 900 Tri-State Building, Cincinnati, Ohio 45202; to E. Hanlin Bavely, 604 Tri-State Building, Cincinnati, Ohio 45202.

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